MISC HAULAGE SERVICES SDN BHD & ANOR v. MOHD ALI AWANG & ORS

HIGH COURT MALAYA, GEORGETOWN
LIM CHONG FONG JC
[JUDICIAL REVIEW NO: 25-45-05-2015]
22 APRIL 2016

ADMINISTRATIVE LAW: *Judicial review – Certiorari – Application to quash award of Industrial Court allowing respondents' claim for backwages and compensation – Whether respondents' dismissal from employment harsh and unjust – Respondents punched cards of fellow workers who were not at work – Whether punch card misconduct a serious breach justifying summary dismissal – Whether employers' course of action in dismissing respondents justified – Whether there was violation of principles of fairness, good conscience and equity – Whether proper case warranting judicial review intervention – Whether award ought to be set aside*

LABOUR LAW: *Dismissal – Misconduct – Respondents punched cards of fellow workers who were not at work – Whether punch card misconduct a serious breach justifying summary dismissal – Whether respondents' dismissal from employment harsh and unjust – Whether employers' course of action in dismissing respondents justified – Whether punishment of dismissal commensurate and was not disproportionate with breach of conduct*

The first to third respondents commenced employment with the applicants as container truck drivers. The terms of their employment were contained in a collective agreement entitled 'Perjanjian Bersama yang Pertama between MISC Haulage Services Sdn Bhd dan Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia' ("collective agreement"). On 25 May 2004, the applicants issued a show cause letter to each of them, alleging that they had committed a misconduct, namely punching somebody else's punch card. A domestic inquiry was held and the first to third respondents were found guilty of the charges as levelled against them. As a result, the first to third respondents were dismissed. Thereafter, the first to third respondents took the matter up before the Ministry of Human Resources and the Minister referred it to the Industrial Court. Subsequently, the Industrial Court heard the first to third respondents' complaint against the unfair dismissal. Although they were found guilty as charged, the Chairman nonetheless held that the punishment of dismissal was too harsh and allowed the first to third respondents' claim for backwages and compensation *in lieu* of reinstatement. The applicants thus applied for a *certiorari* to quash the award of the Industrial Court. The applicants alleged that the Chairman did not take into account relevant considerations in his award when he held that the dismissal of the first to third respondents was too harsh.

Held (granting order of *certiorari*):

(1) Although the words 'punch card' had not been expressly or explicitly stated in art. 21 of the collective agreement, a punch card misconduct fell within its ambit. The punch card is merely a system to record attendance and time keeping and that system is indisputably the method implemented by the applicants for purposes of art. 21. The charges that were proffered against the first to third respondents fit squarely within that provision of the collective agreement. It was also not in dispute that the applicants' punch card contained a warning notice that clearly stated 'Sebarang pekerja yang menolong stemkan kad seseorang pekerja lain akan dikenakan tindakan tatatertib ke atasnya'. (paras 16 & 17)

(2) The Industrial Court Chairman had failed to take into account the relevant consideration that there was at all material times art. 21(i)(I) of the collective agreement that governed the misconduct in issue. In addition, there was art. 21(iv)(g) to justify the applicants' course of action. It was patently wrong for the first to third respondents to punch the cards of their fellow workers who were not at work that would result in the fellow workers being remunerated whilst not being at work. (para 21)

(3) Punch card misconduct had indeed been treated as a serious breach on the part of the employee that justified summary dismissal. This was so even for the first time offender. In other words, no prior warning was required. The harsh punishment of dismissal commensurate and was not disproportionate with the breach because the nature of the breach itself arguably constitutes civil fraud, if not also cheating under s. 415 of the Penal Code. There was therefore no violation of the principles of fairness, good conscience and equity. (para 30)

(4) This was a fit and proper case that warrants judicial review intervention. The Industrial Court Chairman failed to properly apply the reasonable employer test in commensuration with the punishment. There was merit in the applicants' case. This was an instance where the punishment meted out by the employer had not been disproportionate and hence irrational. The Industrial Court was wrong to substitute the punishment and had in this respect failed to take into account the relevant considerations particularly those relating to the collective agreement. The Industrial Court award was thus set aside. (paras 31 & 34)

Case(s) referred to:

Central Commercial Tyre Retreading Sdn Bhd v. Abd Aziz Abd Wahid [2008] 2 LNS 2010 ***(refd)***

Guppy Plastic Industries Sdn Bhd v. Roshamiza Bt Muhamad & Ors [2013] 4 MLJ 924 ***(refd)***

Harianto Effendy Zakaria & Anor v. Mahkamah Perusahaan Malaysia & Anor [2011] 5 CLJ 188 HC ***(refd)***

Harianto Effendy Zakaria & Anor v. Mahkamah Perusahaan Malaysia & Ors [2014] 8 CLJ 821 FC ***(refd)***
Hume Redland Readymix Sdn Bhd v. K Selvarajoo Karappyia [1999] 2 ILR 535 ***(refd)***
Mohd Rusdi Deraman lwn. Perusahaan Otomobil Nasional Sdn Bhd [2014] 2 LNS 1315 ***(refd)***
Norizan Bakar v. Panzana Enterprise Sdn Bhd [2013] 9 CLJ 409 FC ***(refd)***
Osman Aziz v. Komag USA (Malaysia) Sdn Bhd [2015] 2 LNS 702 ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***
Sony Electronics (M) Sdn Bhd v. Zarina Abdul Latiff [2007] 2 ILR 228 ***(refd)***
Tobacco Importers & Manufacturers Sdn Bhd v. Ponniah @ Chandran a/l Ponnan [1996] 1 ILR 579 ***(refd)***
Unilever (Malaysia) Holdings Sdn Bhd v. Lee Chai Peng & Anor [2004] 3 ILR 753 ***(refd)***

Legislation referred to:
Penal Code, s. 415

For the applicants - Pravin Jessy Kaur & Terry Lim; M/s Jessy & Assocs
For the 1st-3rd respondents - Siti Rafidah Abdul Raof; M/s Aswandi Hashim & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Lim Chong Fong JC:

Introduction

[1] This is a judicial review application brought against the award made by the Industrial Court.

[2] The applicants were the employers of the first to third respondents. The first to third respondents' employment was dismissed by the applicants.

[3] This application is for a *certiorari* to quash the award of the Industrial Court dated 26 February 2015. Basically the Industrial Court found that the dismissal was harsh and allowed the first to third respondents' claim for backwages and compensation *in lieu* of reinstatement.

[4] The affidavits filed for purposes of this application are as follows:

(i) applicants' affidavit in support affirmed by Ku Husni bin Ku Ibrahim dated 26 May 2015;

(ii) applicants' further affidavit affirmed by Lim Sing Ghee dated 30 June 2015;

(iii) first to third respondents' affidavit in reply affirmed by Mohd Ali bin Awang dated 10 February 2016; and

(iv) applicants' affidavit in reply affirmed by Ku Husni bin Ku Ibrahim dated 23 March 2016.

[5] After having read the written submissions filed by the parties, I heard counsel on 8 April 2016. I deferred the matter for two weeks for consideration and I now give my decision hereinbelow with the supporting grounds.

Salient Facts

[6] The first to third respondents commenced employment with the applicants as container truck driver on 2 January 1994, 19 January 2004 and 1 March 2000 respectively. The terms of their employment were contained in a collective agreement entitled Perjanjian Bersama yang Pertama between MISC Haulage Services Sdn Bhd and Kesatuan Pekerja-Pekerja Pengangkutan Semenanjung Malaysia ("collective agreement").

[7] On 25 May 2004, the applicants issued a show cause letter to each of them. The charge against the first respondent therein reads as follows:

> Bahawa anda, Mohd Ali Bin Awang (No. K/T. 201266) yang bertugas sebagai pemandu, Jabatan Fleet di MHS Pulau Pinang pada 21/05/2004, lebih kurang pada 6.58 pagi di hadapan Pejabat Operasi, telah melakukan perbuatan salah laku kerana merakamkan kedatangan pemandu-pemandu yang lain. Antaranya ialah Ishak Bin Mod Noor (No. K/T. 200192) dan Halim Bin Ahmad (No. K/T. 200012).

The charge against the second respondent therein reads as follows:

> Bahawa anda, Rusfizan Bin Abd Razak (No. K/T. 251297) yang bertugas sebagai pemandu, Jabatan Fleet di MHS Pulau Pinang pada 21/05/2004, lebih kurang pada 7.24 pagi di hadapan Pejabat Operasi, telah melakukan perbuatan salah laku kerana merakamkan kedatangan pemandu-pemandu yang lain iaitu Mohamed Rushdan Bin Ridwan (No. K/T. 200759).

The charge against the third respondent therein reads as follows:

> Bahawa anda, Hamdi Bin Hamid (No. K/T. 201338) yang bertugas sebagai pemandu, Jabatan Fleet di MHS Pulau Pinang pada 21/05/2004, lebih kurang pada 7.08 pagi di hadapan Pejabat Operasi, telah melakukan perbuatan salah laku kerana merakamkan kedatangan pemandu-pemandu yang lain.

[8] The applicants thereafter issued a notice entitled "Notis Sesi Temubual" dated 1 July 2004 to each of the first to third respondents wherein they were duly informed that a domestic inquiry would be held on 8 July 2004.

[9] The domestic inquiry was held on 8 July 2004 as scheduled wherein the first to third respondents were represented by two union officials. The domestic inquiry panel after hearing the parties concluded that the first to third respondents were guilty of the charges as levelled against them.

[10] As the result, the first to third respondents were dismissed by the applicants with immediate effect on 16 August 2004.

[11] The first to third respondents thereafter took the matter up before the Ministry of Human Resources and the Minister referred it to the Industrial Court.

[12] Subsequently, the Industrial Court heard the first to third respondents' complaint against the unfair dismissal. Although they were found guilty as charged, the Industrial Court Chairman nonetheless held that the punishment of dismissal was too harsh. The chairman in his award stated as follows:

> In the light of evidence as adduced the Court finds that it is clear that the Company has established its case against the Claimants on balance of probability. The totality of evidence before this Court show clearly that the employer had reasonable grounds for believing that the said misconduct, namely punching somebody else punch card had been established in respect of all the Claimants …This court referred to Article 21 of the Collective Agreement *vide* COG 11/2001 where it does not make any reference to punch cards even though the Company had punch card since 1995. The Punch Card offence is not stated in this Article such absence can only mean that the Company in reality did not treat this as a serious requirement. Punch card offence is not even among misconducts listed in Article 21 therefore it was not a so serious as to attract a grave punishment using the doctrine of proportionality of punishment.

Contentions And Findings

[13] At the hearing of this application, the applicants summed up that there is only a single issue, *to wit*: the learned Industrial Court Chairman did not take into account relevant considerations in his award when he held that the dismissal of the first to third respondents was too harsh. Obviously the respondents retorted that the learned chairman correctly made his award after having taken into account all relevant considerations.

[14] The function and power available to me here has been succinctly explained by Raus Sharif PCA in the Federal Court case of *Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2013] 9 CLJ 409 as follows:

> [34] This point has been made earlier but deserves to be reiterated. A public officer who wishes to challenge any allegation of misconduct against him for which punishment has been imposed can only do so by challenging it in the High Court by way of judicial review. It is pertinent to note that the said public officer cannot challenge the punishment imposed, but only the allegations preferred against him. This clearly explains why the court must not substitute its own view as to what is the appropriate penalty for public officer's misconduct, for the view of the particular disciplinary committee as rightly held by the minority view in *Tan Teck Seng* and the Federal Court in *Ng Hock Cheng*.
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> [35] However, the same cannot be true with regard to the dismissal cases involving private sector employees. Any complaint of unfair dismissal by an employee has to be dealt with under the IRA. The duty of the Industrial court in dealing with such cases had been laid down in *Hong*

Leong Assurance and *Milan Auto*, ie, first to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal. In deciding whether the proven misconduct would constitute just cause or excuse, the Industrial court is fully endowed with the power to consider whether the misconduct proved warrants the punishment of dismissal.

[36] Thus, in reference to the questions posed to us, we are of the view that the Industrial court has the jurisdiction to decide that the dismissal of the appellant was without just cause or excuse by using the doctrine of proportionality of punishment and also to decide whether the punishment of dismissal was too harsh in the circumstances when ascertaining the award under s. 20(3) of the IRA. We are further of the view that the Industrial court in exercising the aforesaid functions can rely to its powers under s. 30(5) of the IRA based on the principle of equity, good conscience and substantial merit of the case.

[37] Clearly, the reference by the Federal Court in *Milan Auto*'s decision to the "two fold" test, especially the second fold where the Industrial Court has to decide whether the proven misconduct constitutes just cause or excuse for the dismissal is clear reference to the duty of the Industrial Court to apply the doctrine of proportionality of punishment. This is consistent to what is required of the Industrial court under s. 30(6) in making an award which provides:

> (6) In making its award, the court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under s. 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under s. 20(3).

[38] Pertinent to note that, under the IRA itself there is an inbuilt mechanism through Item 5 of the Second Schedule to consider the doctrine of proportionality of punishment. Item 5 provides as follows:

> Any relief given shall take into account contributory misconduct of the workman.

[39] Based on the above, it is clear that the Industrial Court can go on to decide on the relief to be granted by taking into account of contributory misconduct and as such we are of the view that the doctrine of proportionality of punishment is already inbuilt into the IRA. Thus, the Industrial Court can substitute its own view as to what is the appropriate penalty for the employee's misconduct, for the view of the employer concerned.

[40] *As to what is the exact test to be used in deciding whether the proven misconduct constitutes a just cause or excuse for dismissal is a non-issue. Whether it is the reasonable employer's test as adopted by British Leyland or the reasonable man test as laid down by the Federal Court in Hong Leong Assurance, the Industrial Court's decision on that issue is always open to judicial review.*

> [41] *It is trite law that the decision of the Industrial Court is susceptible to judicial review on the grounds of "illegality", "irrationality", "procedural impropriety" and possibly "proportionality" under which the courts are clothed with powers to scrutinise the decision not only for process but also for substance*. (See *R Rama Chandran v. Industrial court of Malaysia & Anor* [1997] 1 CLJ 147). *Decided cases after Rama Chandran had clearly established that where the facts do not support the conclusion arrived at by the Industrial Court or the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, such findings are always amenable to judicial review* (see *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79; *Swedish Motor Assemblies Sdn Bhd v. Hj Md Ison Baba* [1998] 3 CLJ 288; *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625 and *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 4 ILR 475). (emphasis added)

[15] Furthermore in *Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor* [2011] 5 CLJ 188, Aziah Ali J (now FCJ) held as follows:

> [30] In the award the Industrial Court did take into consideration the misconduct and the fact that the 2nd respondent is in the banking industry. The Industrial court is of the view that the punishment of dismissal is appropriate. I am of the view that there is no error committed by the Industrial court. *The "fairness or unfairness of the dismissal is to be judged ... by the objective standard of the way in which a reasonable employer in those circumstances, in that line of business, would have behaved*". (Phillips J in N. C. Watling & Co. Ltd.) *Bearing in mind the "range of possible reasonable responses" and that the employer is "the best person to judge the seriousness of misconduct of an employee" the court ought not to substitute its own view on the punishment as different employers react differently to an employee's misconduct*. (emphasis added)

I noted that this High Court decision has subsequently been affirmed by the Federal Court in *Harianto Effendy Zakaria & Ors v. Mahkamah Perusahaan Malaysia & Anor* [2014] 8 CLJ 821.

[16] The learned Industrial Court Chairman found that there isn't any provision in art. 21 of the collective agreement on discipline that dealt with punch card misconduct. The applicants however contended that he was mistaken and pointed to art. 21(i)(l) which provides:

> Memalsukan kenyataan kedatangan sendiri atau pekerja lain atau merakam kedatangan pekerja lain.

I agree with the applicants' contention. Although the words "punch card" have not been expressly or explicitly stated in that provision, it is plain to me that that punch card misconduct falls within its ambit. The punch card is merely a system to record attendance and time keeping and that system is indisputably the method implemented by the applicants for purposes of art. 21(i)(l) since 1995. The charges that were proffered against the first to third respondents in my view hence fit squarely within that provision of the collective agreement.

[17] It is also not in dispute that the applicants' punch card contained a warning notice that clearly stated: "sebarang pekerja yang menolong stemkan kad seseorang pekerja lain akan dikenakan tindakan tatatertib ke atasnya".

[18] I also observed that art. 21(iv) of the collective agreement provides as follows:

> Tindakan tatatertib yang akan diambil oleh Syarikat terhadap pekerja yang didapati bersalah atas tuduhan tidak berdisiplin atau perbuatan salah laku adalah bergantung kepada seriusnya sesuatu salah laku. Syarikat boleh samada:
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> (a) memberi amaran secara lisan atau bertulis kepada pekerja; atau
>
> (b) pekerja akan digantung kerja tanpa gaji untuk tempoh tidak melebihi tujuh (7) hari; atau
>
> (c) dipupus kenaikan gaji pada masa pekerja itu layak menerima; atau
>
> (d) dipupuskan bonus pada masa pekerja itu layak menerima; atau
>
> (e) menangguhkan kenaikan gaji tidak melebihi enam (6) bulan; atau
>
> (f) menurunkan pekerja itu ke gred ynag lebih rendah; atau
>
> (g) pekerja itu dipecat; atau
>
> (h) lain-lain hukuman yang sesuai.

[19] The applicants invoked art. 21(iv)(g) of the collective agreement and dismissed the first to third respondents after the disciplinary inquiry found them guilty as charged.

[20] The learned Industrial Court Chairman however substituted his views on the punishment by reason that the dismissal of the first to third respondents in his opinion was too harsh based on the doctrine of proportionality of punishment. In this respect, he found the punch card misconduct not to be a serious one because there isn't any provision on it in art. 21 of the collective agreement.

[21] Consequently it is plain here that the learned Industrial Court Chairman has failed to take into account the relevant consideration that there is at all material times art. 21(i)(l) of the collective agreement that governed the misconduct in issue. In addition, there is art. 21(iv)(g) to justify the applicants' course of action. It is patently wrong for the first to third respondents to punch the cards of their fellow workers who were not at work that would result in the fellow workers being remunerated whilst not being at work.

[22] Be that as it may, I further observed that punch card misconduct has been found to constitute just cause or excuse for dismissal in a plethora of Industrial Court cases.

[23] Firstly in *Tobacco Importers & Manufacturers Sdn Bhd v. Ponniah @ Chandran a/l Ponnan* [1996] 1 ILR 579, the court held as follows:

> The Court is satisfied that COW5 was a truthful witness. Although her evidence is circumstantial it points irresistibly to the claimant punching the other employees' time cards. Therefore the Court finds that the claimant was guilty of the charge. According to the provisions on discipline contained in the collective agreement between the company and the employees' union the offence of knowingly punching another employees' time card is serious enough to entitle the company to dismiss the employee without notice. In the premises the Court upholds the claimant's dismissal, and the claim is dismissed.
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> In the circumstances the Court holds the claimant's dismissal justified and dismisses his claim.

[24] Next in *Hume Redland Readymix Sdn Bhd v. K Selvarajoo Karappyia* [1999] 2 ILR 535, the court held as follows:

> Having found nothing contradictory in the company's evidence, nor was there anything inherently improbable, the court will rule that the two allegations of misconduct committed by the claimant on 26 September 1997 and 2 October 1997 having been proved to the satisfaction of the court on a balance of probabilities.
>
> Based on equity and good conscience and also the substantial merits of the case, the dismissal of the claimant was effected with just cause and excuse.

[25] Then in *Unilever (Malaysia) Holdings Sdn Bhd v. Lee Chai Peng & Anor* [2004] 3 ILR 753, the court held as follows:

> In the submission for the company a passage from *Employees Misconduct* by Alfred Avins was referred to. The said passage as found at p. 486 reads as follows:
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> > Time Card. Since the purpose of a time card is to record when the employee to whom it was issued arrives and departs, punching the time card of another employee constitutes a false representation that the employee to whom the card was issued has punched it, and there is therefore misconduct. The Irish Labour Court has held it to be misconduct to let one's brother "clock-in" one's time card. It is no excuse for punching the time-card of an absent co-employee that the latter made this request. In one case, a Canadian arbitration panel pointed out:
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> > > The Union argued that this was not a serious offence, that little or no loss of money was occasioned to the company, that the company had not posted any rule or warning against one employee punching the time card of another, that Preston had never been really warned and therefore dismissal was too severe a penalty. It must be kept in mind that there are many offences for which an employee may be justly discharged without the necessity of prior warning.

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> It must be well known to all employees without notice or warning that one employee should not punch the time card of another especially when that other employee has not arrived. To do so is to falsify time records and to defraud the company of an amount of money even though it be very small if the other employee is more than three minutes late. I do not think the amount of money is so important as the principle ...

B

> In this circumstances, despite the 2nd claimant having a long and clean record with the number of upgradings and multiple job scopes with the company, the court is of the view the punishment of dismissal was not too harsh. This is because the misconduct committed was serious and the 2nd claimant was aware that it was wrong to swipe someone else's card. Hence the court finds that the 2nd claimant's dismissal was with just cause or excuse.

C

[26] Subsequently in *Sony Electronics (M) Sdn Bhd v. Zarina Abdul Latiff* [2007] 2 ILR 228, the court held as follows:

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> (12) From the documentary evidence, the claimant had swiped the attendance card on behalf of Mr. Philip not for a day or two but for an accumulated period of 99 out of 200 working days from April to November 2000. She had committed the misconduct for a long duration of time and it could only have been done with her full knowledge and deliberation. It certainly did not justify her actions as by so doing, she had defrauded the respondent on the time attendance of Mr. Philip and she would have been well aware of it. For misconduct of such a nature, committed with full knowledge and deliberation and tainted with dishonesty towards the integrity of the claimant, it would be difficult for any employer to repose trust and confidence in her anymore and any reasonable employer in the circumstances and facts of the case would have dismissed the claimant.

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[27] Thereafter in *Central Commercial Tyre Retreading Sdn Bhd v. Abd Aziz Abd Wahid* [2008] 2 LNS 2010, the court held as follows:

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> Having considered the evidence and the documents adduced by the parties before the Court, the Court is satisfied that the Company had proved its case on the balance of probabilities that the Claimant had committed a serious breach of misconduct against the Company. Although the issue of the missing items is not proven against the Claimant, the fact that the Claimant had admitted to clocking of another person's punch card and corroborated by the document at CO p. 16, is serious enough for the Company to justify the punishment of dismissal against the Claimant.

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> For the reasons enumerated above the Court therefore holds that the Claimant's claim is hereby dismissed.

I

> Just dismissal.

[28] More recently in *Osman Aziz v. Komag USA (Malaysia) Sdn Bhd* [2015] 2 LNS 702, the court held as follows: A

> An employee stamping another employee card would be liable to instant dismissal. By scanning in Abdul Rahim bin Majid when he was not at work, the Claimant had committed a gross misconduct which undermined the confidence of the management to continue him in employment. The B Claimant was fully aware of the Company's rules and regulations and yet he did it. In the circumstances, this Court is of the view that the Company cannot be faulted for entertaining a reasonable suspicion amounting to belief in the guilt of the Claimant as regard to this charge at that time. For the reason given, it is the finding of this Court that the Claimant is guilty of the charge and as such the dismissal is with just cause and C excuse.

[29] Furthermore in *Mohd Rusdi Deraman lwn. Perusahaan Otomobil Nasional Sdn Bhd* [2014] 2 LNS 1315, the court held:

> Dalam kes ini kesalahan Yang Menuntut adalah merupakan salah laku D berat (serious misconduct) dan Syarikat telah menjalankan budi bicaranya dengan betul untuk memecat pihak Yang Menuntut.

[30] Consequently, it can be concluded that punch card misconduct has indeed been treated as a serious breach on the part of the employee that justified summary dismissal. This is so even for the first time offender. In E other words, no prior warning is required. The harsh punishment of dismissal in my view commensurate and is not disproportionate with the breach because the nature of the breach itself arguably constitutes civil fraud, if not also cheating under s. 415 of the Penal Code. In my view, there is therefore no violation of the principles of fairness, good conscience and F equity.

[31] In the circumstances, I am of the view that this is a fit and proper case that warrants judicial review intervention. The learned Industrial Court Chairman failed to take into account relevant considerations and accordingly failed to properly apply the reasonable employer test in commensuration G with the punishment meted out.

[32] As pointed out by the applicants, I also noted that the first to third respondents also raised several new and unpleaded issues in this judicial review application such as the applicants' failure to specify the misconduct in detail, failure to state that the first to third respondents' actions caused loss H to the applicants, charges stated in the show cause letter was not read with art. 21 of the collective agreement, other punishments were available in art. 21(iv) of the collective agreement, etc. They were also not put to the applicants' witnesses in the Industrial Court. It is clear in *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629 that non pleaded issues I could not been entertained and taken into consideration in the judicial review

proceedings. In my view, the applicants would be also prejudiced if these issues are entertained since they were not put to them to explain their stand and course of action taken.

Conclusion

[33] In the Court of Appeal case of *Guppy Plastic Industries Sdn Bhd v. Roshamiza Bt Muhamad & Ors* [2013] 4 MLJ 924, Abdul Wahab Patail JCA held as follows:

> [10] Although it is within the powers of the High Court in *certiorari* proceedings to disagree with the Industrial Court on the conclusions or inferences drawn by the latter from the proved or admitted evidence on the ground that no reasonable tribunal similarly circumstanced would have arrived at such a conclusion or drawn such an inference, it is not for the court to lightly substitute it view for that of the Industrial Court, nor for that matter, the latter to lightly substitute it view of what is the appropriate punishment for that of the employer, in particular as to dismissal: *Harianto Effendy Zakaria & Anor v. Mahkamah Perusahaan Malaysia & Anor* [2010] MLJU 1175; [2011] 5 CLJ 188; *Ng Hock Cheng v. Pengarah Am Penjara & Ors* [1998] 1 MLJ 153; [1998] 1 CLJ 405; *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771 …
>
> [11] *That a punishment is rather heavier than what a court thinks is appropriate does not mean that the punishment is irrational. It must be so disproportionate that it is irrational. An employer is entitled, on the findings on the first and second allegations in particular, to his own judgment, unless it is shown to be irrational, as to the appropriate punishment for the general good of his company and his other employees* … (emphasis added)

[34] For the foregoing reasons, there is merit in the applicants' case. This is an instance where the punishment meted out by the employer has not been so disproportionate and hence irrational. The Industrial Court was wrong to substitute the punishment. As mentioned, the Industrial Court has in this respect failed to take to account the relevant considerations particularly those relating to the collective agreement. I therefore grant an order of *certiorari* to quash and set aside Award No. 206 of 2015 dated 26 February 2015 made pursuant to Industrial Court Case No. 9/4-1122/06.

[35] I further order costs of RM750 to be paid by each of the first to third respondents to the applicants.